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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. _____

PFEIFFER ELECTRIC COMPANY,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

PFEIFFER ELECTRIC COMPANY, Petitioner herein, prays that a writ of certiorari be issued to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas to review its judgment herein reversing the judgment of the District Court of Harris County, Texas, 61st Judicial District, and remanding this case for a trial upon its merits to the said district court.

OPINIONS BELOW

The judgment of the 61st District Court of Harris County, Texas, was entered without written opinion. The opinion of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas in support

of its judgment herein (R. 10), printed in Appendix A hereto, *infra,* pp. 1A-6A, is officially reported at 358 S. W. 2d. 711. The order of the said Texas Court of Civil Appeals overruling Petitioner's motion for rehearing (R. 5) was entered without opinion. The order by the Supreme Court of Texas denying Petitioner's Application for Writ of Error to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas (R. 16, 569) was entered with only the docket notation, "Refused. No reversible error." The order of the Supreme Court of Texas overruling Petitioner's motion for rehearing (R. 16, 569) was entered without opinion.

JURISDICTION

1. The order of the Supreme Court of Texas denying Petitioner's Application for Writ of Error to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas was entered October 17, 1962. Petitioner's motion for rehearing was overruled by the Supreme Court of Texas on December 19, 1962.

2. Jurisdiction is conferred upon this court by Title 28, United States Code, Section 1257 (3):

> a. The action of the Supreme Court of Texas, the highest court of the State of Texas, in refusing Petitioner's Application for Writ of Error to review and correct the errors of law committed by the Court of Civil Appeals for the Sixth Supreme Judicial District in its judgment herein, of which review is hereby sought, was to constitute the said Civil Court of Ap-

peals the highest court of the State of Texas in which a decision herein could be had within the meaning of 28 U.S.C. 1257. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396 (1954).

b. The judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, of which review is hereby sought, is a "final" judgment or decree within the meaning and contemplation of 28 U.S.C. 1257. *Radio Station WOW v. Johnson,* 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945); *Pope v. Atlantic Coast Line R. Co.,* 345 U. S. 379, 97 L. Ed. 1094, 73 S. Ct. 749 (1953); and *Tynberg v. Cohen* 76 Tex. 409, 13 S. W. 315 *(Texas Supreme Court, 1890).* See pp. 16-18, *infra.*

QUESTIONS PRESENTED

The precise and unqualified holding of the Texas Court of Civil Appeals in its judgment, of which review is hereby sought, is that the State of Texas may prosecute a penal suit for an alleged violation of its antitrust statutes contemporaneously with the pendency of prosecution by the federal government of a criminal indictment, returned in a United States District Court in Texas, alleging an antitrust violation based upon the same and identical acts and transactions forming the basis of the alleged antitrust violation in the state action, against substantially the same parties as are defendants in the federal action, one of whom is Petitioner, where interstate commerce is

directly involved in the acts alleged as constituting the antitrust violations.

This case thus raises two questions concerning the jurisdiction of a state to proceed in antitrust enforcement under state laws, neither of which has ever been resolved by this Honorable Court:

1. May a state prosecute for an alleged antitrust violation of its antitrust statutes where interstate commerce is directly involved in or substantially affected by the acts and conduct alleged as constituting the antitrust violation?

2. Does the assertion of federal jurisdiction by the return of a federal criminal indictment alleging a violation of the Sherman Antitrust Act based upon alleged acts and conduct directly involving or substantially affecting interstate commerce, preclude a state from maintaining against the same parties named in the federal indictment, an antitrust penal suit under its antitrust statutes based upon the same acts and conduct as the federal indictment.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The pertinent federal constitutional provisions involved in this case are:

[1] This question has been posed in strict conformity with the requirement that the question be expressed in the circumstances of the case. Correlative to that question and perhaps even more decisive of the merits herein, is the question: May both a state and the federal government prosecute a party for alleged antitrust violations under state and federal antitrust legislation, respectively, which are based upon and arise out of the same alleged acts and conduct, where interstate commerce is directly involved in or substantially affected by those acts and that conduct?

a. Article I, Section 8, Clause 3 of the Constitution of the United States, U.S.C.A. Const. Art. I, Sec. 8 cl. 3:

> "The Congress shall have Power . . . [t]o regulate commerce . . . among the several states . . ."

b. Article VI, Clause 2 of the Constitution of the United States, U.S.C.A. Const. Art. VI, cl 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. The pertinent federal statutes involved herein are:

a. Section 1 of the act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended, c. 647, 26 Stat. 209, 15 U.S.C. Sec. 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by Sec-

tions 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

b. Section 2 of the Act of Congress of July 2, 1890, entitled "'An Act to protect trade and commerce against unlawful restraints and monopolies," as amended, c. 647, 26 Stat. 209, 15 U.S.C. Sec. 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the Court."

3. The involved state statutes are found in Title 126, Trusts—Conspiracies Against Trade, Articles 7426-7447, Vol. 20 B, pp. 261-325, Vernon's Annotated Texas Civil Statutes. These statutes pertinent hereto are: Articles 7426-7428, 7429-7430, 7436, Vernon's Annotated Texas Civil Statutes. (See appendix hereto for text of statutes.)

STATEMENT OF THE CASE

The State of Texas, on June 18, 1959, filed an antitrust suit against Petitioner and various other defendants,[2] under and by virtue of the statutory provisions contained in Title 126, Arts. 7426-7447, inclusive, Vernon's Annotated Texas Civil Statutes, seeking (1) equitable relief against the parties; (2) statutory penalties of not less than $50.00 and not more than $1,500.00 per day from August 15, 1951; (3) a permanent injunction and, (4) a forfeiture of the corporate charter of a trade association (R. 10, 26-40), charging them with a conspiracy and combination to lessen competition in the electrical construction industry in the Houston, Texas, area with respect to the sale and installation of electrical material and equipment in commercial buildings and structures and industrial facilities in the Houston, Texas, area (R. 31).

On January 11, 1960, a federal criminal indict-

[2] The defendants joined in the action are a labor organization, Local No. 716 of the International Brotherhood of Electrical Workers; a trade association of electrical contractors in the Houston, Texas, area, Southeast Texas Chapter of National Electrical Contractors Association; and members of said Association as follows: Hirsh Electric Company, The Howard P. Foley Company, Fischbach & Moore Inc., Electrical Constructors, Inc., Seiders Electric Company, Fisk Electric Company, Pfeiffer Electric Company, H. M. Bradley, individually and doing business as Bradley Electric Company, and A. H. Muhl, individually and doing business as Muhl Electric Company.

[3] An action by the State of Texas founded upon these statutes is not an ordinary civil action but is a "penalty suit" which must be alleged "with the same degree of certainty that is required in a "criminal case", *Ford Motor Company v. State*, 142 Tex. 5, 175 S. W. 2d 233 (Supreme Court of Texas, 1943).

ment was returned in the United States District Court for the Southern District of Texas, Houston Division, against Petitioner and ten other defendants, which included six of those named as defendants in the state action as well as two of their officers[4] (R. 50), charging them, on the basis of the same facts and transactions involved in the state action, with violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. Secs. 1-2, by having entered into an unlawful combination and conspiracy to suppress and eliminate competition in the sale and installation of electrical equipment in the Houston, Texas, area (R. 54-56); the effect of which, it was stated, was a direct unlawful and unreasonable restraint and obstruction of the flow into the Houston area in interstate commerce of electrical equipment, at least 75 percent of which was manufactured in states other than Texas and shipped in interstate commerce directly from such other states to Houston, Texas, for sale and installation in the Houston, Texas, area (R. 53-54).

Certain of the defendants in the state action, including Petitioner, then filed pleas in abatement and to the jurisdiction of the state court based on the existence of federal jurisdiction and the pendency of the federal action which was based upon the same

[4] The indictment named as defendants: Southeast Texas Chapter, National Electrical Contractors Association; J. S. Copeland Electric Co., Inc.; Electrical Constructors, Incorporated; Fischbach & Moore of Texas, Inc.; Fisk Electric Company; Hirsh Electric Company; The Howard P. Foley Company; Daniel Hirsh, President, Hirsh Electric Company; Harold P. Pfeiffer, President, Pfeiffer Electric Company; and one Charles Scholibo.

facts and transactions as formed the basis of the state action (R. 41, 60, 65, 68 and 85). The state trial court sustained these pleas to the jurisdiction and dismissed the state action (R. 78-81).

On an appeal by the State of Texas, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas reversed the judgment of the trial court and remanded the case for a trial on its merits (R. 14). The Court of Civil Appeals, while cognizant of the fact that the State of Texas based its action on the same alleged conspiracy and unlawful practices which formed the basis of the federal criminal indictment, held that the jurisdiction of the state was not "displaced, superseded or preempted" by the federal action notwithstanding its pendency and that the alleged unlawful conspiracy and combination "violate[d] interstate commerce" (R. 10-13). Rehearing was denied by the Court (R. 5-8).

Petitioner and other defendants who had filed pleas in abatement and to the jurisdiction thereupon sought review of the judgment of the Texas Court of Civil Appeals by timely filing applications for writ of error in the Supreme Court of Texas (R. 534). Review was sought upon the grounds that the decision of the Court of Civil Appeals upholding the trial court's jurisdiction of the state penal action under the state antitrust statutes (Articles 7426-7447, inclusive, Vernon's Annotated Texas Civil Statutes) was in contravention of Article I, Section 8, the Commerce Clause of the Constitution of the United States vesting *all* power to regulate interstate com-

merce in the Congress of the United States, and was violative of Article VI, Section 2, the Supremacy Clause of the Constitution of the United States, which makes the federal antitrust statutes (15 U. S. C. Sec. 1, *et seq.)* the *"supreme Law of the Land"* with respect to trade practices in restraint of interstate commerce. (R. 539-545). The Supreme Court of Texas refused said applications on the basis of no reversible error (R. 569). Rehearing was denied (R. 569) and the case was returned to the Texas Court of Civil Appeals for the issuance of its mandate. Petitioner applied to the Texas Court of Civil Appeals for a stay of the issuance of its mandate pending a ruling by the United States Supreme Court on this petition and it was granted (R. 9).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The judgment of the Texas Court of Civil Appeals herein is urged as being erroneous in that its net effect is to permit: (1) state antitrust regulation in the sphere of interstate commerce; and/or (2) an application of state antitrust legislation to trade practices involving or affecting interstate commerce in a manner inconsistent with the intent and purpose of federal antitrust legislation (15 U.S.C. Sec. 1, *et seq.)*, in contravention and violation of both Article I, Section 8 (Commerce Clause) and Article VI, Section 2 (Supremacy Clause) of the United States Constitution.

The decision of the Texas Court of Civil Appeals has erroneously allowed the state to prosecute under

state statutes acts involving interstate commerce. Thus, an application of state statutes to interstate commerce has been permitted in derogation of the exclusive authority to regulate that commerce granted to Congress by the Commerce Clause of the United States Constitution.

The decision is in conflict with that in *Denison Mattress Factory v. The Spring-Air Company*, 308 F. 2d, 403 (5 Cir. 1962) which properly holds the antitrust laws of the State of Texas to be inapplicable to interstate commerce particularly where, as here, local effects are minimal and insubstantial.

Admittedly, interstate commerce is *directly* involved in the acts alleged as constituting the antitrust violations which are the subject of the state and federal prosecution. As heretofore stated, (Statement of the Case, pp. 7-10, *supra*), the state action and the federal action describe the alleged antitrust violations as being conspiracies directed at the "sale and installation of electrical equipment in the Houston area." However, substantially all of the electrical equipment sold and installed in the Houston area is manufactured in other states and the bulk of it is shipped directly from manufacturers in other states through interstate channels to job sites in the Houston area. This electrical equipment, at least 75 to 90% of which is manufactured in states other than Texas, "is shipped in interstate commerce from said states to the Houston area for sale and installation therein"; and "said electrical equipment flows in a continuous, uninterrupted stream from its points of origin in states

other than Texas to its places of installation and use within the Houston area," moving through Petitioner and the other Defendants as "conduits through which electrical equipment produced in states other than Texas is sold and distributed to consumers in the Houston area." The allegations herein thus pertain to a restraint of a stream of interstate commerce. *United States v. Employing Plasterer's Association of Chicago,* 347 U.S. 186, 98 L. Ed. 618, 74 S. Ct. 452 (1954).

The Texas Court of Civil Appeals in rendering its decision overlooked the controlling significance of this *direct* and *substantial* involvement of interstate commerce. It apparently deemed more significant that the state "base(d) its . . . action on conspiracies in restraint of trade committed wholly within the state" (Appendix A, *infra,* p. 4-A). However, as recognized by the federal courts, it is not the *situs* of the commission of the alleged trade acts and practices which is determinative of jurisdiction, it is the *nature of the commerce* involved or affected thereby. *Las Vegas Merchant Plumbers Association v. United States,* 210 F.2d 732 (9 Cir. 1954), cert. den., 348 U.S. 817 (1954).

Even if it be that under the circumstances here, federal jurisdiction is not exclusive but rather concurrent with that of the state, it is petitioner's view that the assertion herein of federal jurisdiction through the return of the federal indictment, arising as it does under federal legislation commonly known as the Sherman Antitrust Act (15 U.S.C. Sec. 1,

et seq.) which, by virtue of its legislative history, demonstrates that it was not the intendment of Congress that both federal and state authorities would *dually*, much less *contemporaneously*, prosecute for trade practices proscribed thereby where interstate commerce was *involved* or *affected*, requires that the state yield its right to exercise any jurisdiction it might have to prosecute the trade practices challenged herein by the federal action. For within the sphere of interstate commerce, federal legislation is, by reason of the Supremacy Clause of the Constitution of the United States, the *"supreme Law of the Land"* and must prevail with respect to any state action inconsistent therewith.

As dual prosecution by both state and federal authorities is inconsistent with the intent and purpose of the federal legislation in question (15 U.S.C. Sec. 1, *et seq.)*, the assertion of federal jurisdiction

[5] *E.g.*, Senator George F. Hoar, a reputed author of the Sherman Act, in 21 Cong. Rec. 1765, *(Bills and Debates in Congress Relating to Trusts*, p. 72), is shown to have stated: "The common law in the States of the Union of course extends over citizens and subjects over which the State itself has jurisdiction. Now we are dealing with an offense against interstate or international commerce, *which the States cannot regulate by penal enactment . . .*" (Emphasis added.) (Petitioner would desire upon the granting of writ of certiorari to brief fully the legislative history of the Sherman Act in support of its contentions.) In addition, the favorable report of the House Judiciary Committee, H.R. Rep. No. 1707, 51st Cong. 1st Sess. (1890), on the Senate Bill that was ultimately enacted included the following statement *(Bills and Debates in Congress Relating to Trusts*, pp. 325-326): "No attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds . . . Congress has no authority to deal, generally, with the subject within the States, and the *States have no authority to legislate in respect of commerce between the several States or with foreign nations.*" (Emphasis added.)

through the return of the federal indictment, being paramount and supreme because of the involvement of interstate commerce, causes no room to be left for state action. Thus, the sustainment of jurisdiction in the state court in the case at bar plainly contravenes and violates Article VI, Section 2 of the United States Constitution.[6]

2. The decision of the Texas Court of Civil Appeals resolving the jurisdictional issue herein in favor of dual as well as contemporaneous state and federal antitrust prosecution of the same parties for the same acts is not in accord with the judicial expressions and declarations contained in several decisions of this Honorable Court which indicate generally its abhorrence of the idea of concurrent separate state and federal antitrust prosecution of the same parties for the same acts. *Jack v. Kansas,* 199 U.S. 372, 50 L.Ed. 234, 36 S. Ct. 73 (1905); *Feldman v. United States,* 322 U.S. 487, 88 L. Ed. 1408, 64 S. Ct. 1082 (1944).

Neither is the decision compatible with the concept of justice and fairness as has evolved in the

[6] The Texas Court of Civil Appeals in its decision herein erroneously ignored in its entirety this contention. Instead, it seems to have chosen the argument advanced by the United States Department of Justice in its *amicus curiae* memorandum to the Court (R. 422-434) that the pendency of the federal action is of no consequence. This is evident from the language of the opinion of the Court (Appendix A, *infra,* p. 5-A) which reads: "The same consideration would be involved and the preemption defense would be available, if no federal case were pending." Petitioner does not agree that preemption may not turn on whether both the federal and state sovereigns have in fact brought suit and will vigorously support its position in this regard if permitted to do so.

development of American jurisprudence which has always condemned oppressive prosecution. Moreover, Petitioner now finds itself being prosecuted in both federal and state antitrust prosecutions for the same alleged conspiracy, based on the same facts, restraining the same commerce, *in the only known American appellate court decision, state or federal, which adjudicates the issue.*

The Texas Court of Civil Appeals recognized that its decision was in such an area when it stated in its opinion (Appendix A, *infra,* p. 4-A): "Neither the Supreme Court of Texas nor the United States Supreme Court has heretofore considered the question of whether a Federal indictment under the Sherman Act is preemptive and excludes Texas from bringing a civil action for an alleged violation of local antitrust laws."

Precisely for this reason, the case at bar has led to national recognition[7] of an *immediate* need for adjudication by the highest judicial authority of this country of the basic issue herein of whether the

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[7] The decision of the Texas Court of Civil Appeals herein was the subject of a presentation by the Honorable Stanley Mark, Attorney General of California, and a discussion by the Anti-Trust Section of the American Bar Association at its meeting in San Francisco in August, 1962. The Attorney General of Texas also discussed the case at bar before the National Conference on Antitrust Problems and Consumer and Investor Protection in Washington, D. C., on November 13, 1961. This conference, jointly sponsored by the Antitrust Division of the Department of Justice and the National Conference of States' Attorney General, in realization of the problems created by the issue presented in this case, adopted a resolution advocating legislation to accomplish division of state and federal antitrust enforcement jurisdiction.

Supremacy and Commerce Clauses of the United States Constitution preclude the prosecution under state law of a state antitrust penal action which duplicates a federal antitrust prosecution arising under federal antitrust legislation wherein there is, as here, admitted federal jurisdiction because of the involvement of interstate commerce.

To deny review of this case would result in a sanction without opinion by this Honorable Court of a decision of an intermediate appellate state court, which Petitioner feels to be erroneous, resolving federal questions which are of extreme and vital importance to the jurisprudence of the nation and every one of its states as it pertains to federal-state relationship in the field of antitrust law enforcement.[8]

3. Posed in these circumstances, the constitutional and federal questions raised herein would seem to satisfy the most stringent standards of discretionary review of this Honorable Court.

Although contained in a judgment which does not on its face end the litigation but rather remands the case for trial on its merits, the constitutional and federal questions are yet ripe for adjudication when tested against the policy of 28 U.S.C. Sec. 1257, which is to allow immediate review notwithstanding the *mere possibility* of further review of other facets

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[8] This case would be an excellent vehicle for a definitive opinion by this Honorable Court promulgating federal and state antitrust jurisdictional guidelines as was *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 3 L. Ed. 775, 79 S. Ct. 773 (1959), in defining state and federal jurisidiction in the field of labor law.

of a case dissociated entirely from finally adjudicated federal questions, if to deny review would not fully and adequately save the rights of the parties. *Radio Station WOW v. Johnson,* 326 U.S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945).

That there has been a final and conclusive adjudication by the highest court of the State of Texas of the constitutional and federal questions involved herein as raised in the trial court by Petitioner's plea in abatement and to the jurisdiction, is so by reason of the fact that under Texas law, upon the occasion of a plea in abatement having been once decided adversely to a defendant upon appeal to the appellate courts of Texas, the defendant is not entitled to raise or to have such plea tried again notwithstanding subsequent litigation of the case on its merits. *Tynberg v. Cohen,* 76 Tex. 409, 13 S. W. 315) (Texas Supreme Court, 1890).

Not only has the facet of the case at bar of which review is sought been finally resolved by the highest court of the State of Texas in which review could be had, but being jurisdictional in nature, it is separable and distinct from the merits of the case, which, if the state court is without jurisdiction to proceed, need not ever be resolved.

The last cited factor is most significant for it exemplifies the contention now made that the circumstances of the instant case make it one especially calling for immediate review by this Honorable Court if Petitioner's rights are to be "fully and adequately" saved since irremediable injury may result to Petitioner if it must submit to a trial on the merits.

For if the jurisdictional questions should be resolved in its favor only subsequently upon a deferred review, after a protracted trial on the merits, Petitioner will have been put to unnecessary delay, uncertainty and expense in defending the case on its merits, the result of which would not affect it. Thus, the need for further proceedings may never arise if the constitutional and federal questions raised are determined at this stage of the proceedings. To deny review under these circumstances would not appear to be the policy of Section 1257. *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 97 L. Ed. 1094, 73 S. Ct. 749 (1953).

Finally, Petitioner urges that the constitutional and federal questions adjudicated by the decree of the Texas Civil Court of Appeals are of such imperative public concern as to require the exercise by this Honorable Court of its discretion in order that it may review at this time these questions.

WHEREFORE, your Petitioner respectfully submits that Writ of Certiorari should issue to the end that this Court may review the decision of the Civil Court of Appeals for the Sixth Supreme Judicial District of Texas to determine the propriety of its resolution of the constitutional and federal questions involved and raised herein.

January 1963

HENRY L. SCOTT
J. PAUL POMEROY, JR.
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, _____, Attorney for PFEIFFER ELECTRIC COMPANY, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of January, 1963, I served the foregoing Petition for Writ of Certiorari on the Respondent State of Texas by mailing from Washington, D. C., copies thereof in duly addressed envelopes with air mail postage prepaid, to the Honorable Waggoner Carr, Attorney General of Texas, Austin, Texas, and the Honorable Joe Reynolds, Special Assistant Attorney General, First City National Bank Building, Houston, Texas.

_____

Attorney for PFEIFFER ELECTRIC COMPANY
402 Pierce Avenue
Houston 1, Texas

APPENDIX A

Opinion of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas

THE STATE OF TEXAS, *Appellant,*

No. 7430 v.
SOUTHEAST TEXAS CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, et al, ... *Appellees.*

Appeal from the District Court of Harris County, Texas.

Plaintiff-appellant, the State of Texas, on June 18, 1959, filed a civil anti-trust suit under Title 126, Arts. 7426-7447, inclusive, V.A.T.C.S., and the Constitution of Texas, seeking (1) equitable relief against the parties; (2) for statutory civil penalties; (3) a permanent injunction; and, (4) for a forfeiture of a corporate charter of the Southeast Texas Chapter of National Electrical Contractor's Association (hereinafter referred to as N.E.C.A.), against N.E.C.A., et al, for certain alleged unlawful operations, conspiracies and practices in restraint of trade committed wholly within Texas.

On January 11, 1960, a Federal Grand Jury of the Southern District of Texas returned a criminal indictment against a number of the defendants in this case, charging them with violations of the Federal anti-trust laws and alleging certain unlawful operations, conspiracies and practices in restraint of trade, and a violation of interstate commerce. The Sherman Act, 15 USCA § 1, et seq.; Art. 1, U.S. Const. § 8; Art. VI, U.S. Const. § 2.

Certain defendants in this case filed pleas in abatement to the effect that the Federal criminal indictment was based upon the same alleged unlawful operations, conspiracies, and the same interstate commerce as those alleged in the civil action by Texas. The defendants took the position that the Sherman Act had preempted the field in which the Texas anti-trust laws operate, and that only the Federal courts had jurisdiction. The trial court, finding that the suit was not properly severable as to the other defendants, sustained the pleas and dismissed the case as to all the defendants, holding that the Texas State Court was without jurisdiction because of the Federal criminal indictment. From the judgment of dismissal, Texas has perfected its appeal.

The appellant takes the position that the trial court erred in dismissing the case because the state court's jurisdiction had not been displaced, superseded, or preempted by the Federal criminal indictment, or the Sherman Act.

The United States, by amicus curiae brief takes the position that the Sherman Act does not preempt the field of regulations of interstate trade and commerce, thereby precluding Texas from exercising jurisdiction over the anti-trust matter, in the exercise of its police power.

Texas bases its case upon allegations of unlawful operations and conspiracies for sale and installed prices of electrical equipment, and such operations constitute a fixed, maintained and increased price in violation of the anti-trust laws of Texas.

The Federal criminal indictment is based upon the same transactions; and, a violation of the interstate commerce laws.

In the civil suit by Texas, the "Houston area" is defined as a "portion of Harris County, and Brazoria and Fort Bend Counties, Texas." It alleged that N.E.C.A. was a trade association and had a charter from Texas.

The Federal indictment defines the "Houston area" as follows:

> "As used herein, the term 'Houston area' includes the City of Houston, Texas, and that portion of the State of Texas lying within sixty miles of Houston."

The Federal indictment further alleged:

> "From 75 to 90 percent of the electrical equipment sold and installed in the Houston area is manufactured in states other than Texas and is shipped in interstate commerce from said states to the Houston area for sale and installation therein. In 1956 said interstate commerce was in excess of $6,000,000."

There are no findings of fact or conclusions of law by the trial court. It probably based its decision upon the holding in Commonwealth of Pennsylvania v. Steve Nelson, 350 U.S. 497, 76 Sup. Ct. 477. Three Justices dissented. Nelson was indicted, tried and convicted of the offense of "sedition" by the State of Pennsylvania. He was also indicted, tried and convicted under a Federal indictment for the same offense and transactions. That case is not in point here.

The Texas anti-trust laws have been upheld as valid and constitutional. 29 Tex. Jur. 747 § 6; 58 C.J.S. 998, § 28; 36 Am. Jur. 593, Chap. 6.

Texas bases its civil action on conspiracies in restraint of trade committed wholly within the state. 29 Tex. Jur. 768, § 19. The appellees were not indicted by the courts of Texas. 29 Tex. Jur. 778, § 25.

The Federal government may institute criminal or civil proceedings for violations of the Federal anti-trust laws. 58 C.J.S. 1140, Chap. VIII. A state may seek civil penalties for violations of state anti-trust laws. 58 C.J.S. 1156, Chap. IX.

Neither the Supreme Court of Texas nor the United States Supreme Court has heretofore considered the question of whether a Federal indictment under the Sherman Act is preemptive and excludes Texas from bringing a civil action for an alleged violation of local anti-trust laws. The state court of Wisconsin has held that a Federal action will not affect the right of the state to prosecute their anti-trust violators. State of Wisconsin v. Allied Chemical & Dye Corporation, 9 Wisc. 2d 290, 101 N.W. 2d 133. The Texas courts and the lower Federal courts have made it clear that the Texas courts can proceed, in anti-trust suits, without reference to a Federal court action, even though the same parties and the same subject matter are involved in both actions. Bergholm v. Peoria Life Ins. Co., T.C.A., 63 S.W. 2d 1064, n.w.h.; Byrd-Frost, Inc. v. Elder, 93 Fed. 2d 31; Sessions Company v. W. A. Sheaffer Pen Company, T.C.A., 344 S.W. 2d 180, er. ref.

Preemption has always been decided on the basis

of whether or not, as applied to this particular case, the State laws are repugnant and in conflict with the Federal law. There have been no final convictions in either case, and both Texas and the Federal government by their pending actions are seeking to examine the lawfulness of the acts of the appellees. The same consideration would be involved and the preemption defense would be available, if no Federal indictment was pending. State of Wisconsin v. Allied Dye and Chemical Company, supra.

We are called upon to decide whether or not Federal laws regulating anti-trust and interstate commerce preempts the field in which the anti-trust laws of Texas operate. This does not seem to be the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corporation, 331 U.S. 218. The State is entitled to proceed. State of North Carolina v. United States of America, 325 U.S. 507; State of Florida v. United States of America, 282 U.S. 194; George M. Napier v. Atlantic Coast Line Railroad Company, 272 U.S. 605. State anti-trust laws are on a different footing from state labor legislation, the sedition laws, and others, that the United States Supreme Court has struck down on preemption grounds. In the anti-trust laws, however, the Sherman and Clayton Acts, exclusive of these exceptions, have been enforced concurrently by the Department of Justice, Federal Trade Commission, the states, and private litigants. The state protection of its own commerce against conspiracies in restraint of trade which also violate interstate commerce, is supplementary to the Federal regulatory scheme. It

operates in areas not reached by Federal authority. Compare Commonwealth of Pennsylvania v. Steve Nelson, supra, with Willard Uphaus v. Louis C. Wyman, 360 United States 72.

The judgment of the trial court is reversed and the case is reinstated for a trial upon its merits.

Reversed and remanded.

MATT DAVIS
Associate Justice

June 12, 1962.
Filed June 12, 1962.

APPENDIX B

Articles 7426-7428, 7429-7430, 743C, Vernon's Annotated Texas Civil Statutes

ART. 7426. "TRUSTS"

A "trust" is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

1. To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State.

2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

4. To fix, or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of

any product for market or transportation, shall be in any manner affected, controlled or established.

5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

6. To regulate, fix or limit the output of any article or commodity which may be manufactured,

mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof. Acts. 1903, p. 119.

ART. 7427. "MONOPOLY" DEFINED

A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

ART. 7428. CONSPIRACIES AGAINST TRADE

Either or any of the following acts shall constitute

a conspiracy in restraint of trade:

1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or undertaking to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

3. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott, or enter into any agreement or understanding to refuse to transport, deliver, receive, accept, erect, assemble, operate, use or work with any goods, wares, merchandise, articles or products of any other person, firm, corporation or association of persons; provided, however, that this subdivision of this Article shall not be construed to apply to an agreement between employees to terminate their employment, or to refuse to transport, deliver, receive, accept, erect, assemble, operate, use or work with the goods, wares, merchandise, articles or products of their immediate employer unless such refusal is intended or calculated to induce, or shall have the effect of inducing, such employer to refrain from

purchasing or from otherwise acquiring goods, wares, merchandise, articles or products from any person, firm, corporation or association of persons. Acts 1903 p. 119; Acts 1947, 50th Leg. p. 530, ch. 310 § 1.

ART. 7429. ACTS ILLEGAL

Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are prohibited and declared to be illegal. Acts 1903 p. 119.

ART. 7430. CHARTERS FORFEITED

The Charter of any corporation chartered under the laws of this State, adjudged guilty of violating any provision of this subdivision may be forfeited at the request of the Attorney General, if in the judgment of the court before whom the litigation is pending, the public interest requires it, provided, the forfeiture of the charter shall be in addition to all other penalties prescribed by law. Acts 1903 p. 119; Acts 1923 p. 12.

ART. 7436. PENALTIES; VENUE; FEES

Each firm, person, corporation or association of persons, who shall in any manner violate any provision of this subdivision shall for each day that such violation shall be committed or continued, forfeit and pay a sum of not less than fifty nor more than fifteen hundred dollars, which may be recovered in the name of the State of Texas in the district court of any county in the State of Texas; and venue is hereby given to such district courts. When any such

suit shall have been filed in any county and jurisdiction thereof acquired, it shall not be transferred to any other county, except upon change of venue allowed by the court. It shall be the duty of the Attorney General or the district or county attorney under the direction of the Attorney General, to prosecute for the recovery of the same. The fees of the district or county attorney for representing the State in all anti-trust proceedings, or for the collection of penalties for the violation of the anti-trust laws of this State, shall be ten per cent of the amount collected up to and including the sum of fifty thousand dollars, and five per cent of all sums in excess of the first fifty thousand dollars, to be retained by him when collected, and all such fees which he may collect shall be over and above the fees allowed under the general fee bill. The provisions of this subdivision as to fees allowed the prosecuting attorney shall not apply to any case in which judgment has heretofore been rendered in any court nor to any monies to be hereafter collected upon such judgment heretofore rendered in any court, whether such judgment or judgments are pending upon appeal or otherwise. The district or county attorney who joins in the institution or prosecution of any suit for the recovery of penalties for a violation of any of the anti-trust laws of this State, who shall, previous to the collection of such penalties, cease to hold office, shall be entitled to an equal division with his successor of the fee collected in said cause. In case of the employment of special counsel by any such district or county attorney, the contract so made shall be binding upon such

prosecuting officer making such contract and thereafter retiring from office. In case any suit is compromised before any final judgment in the trial court is had, then the fees herein provided for shall be reduced one-half. Acts 1903 P. 119; Acts 1909 P. 281.